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The Permanent Injustice of Guantánamo

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When the prison at Guantánamo Bay, Cuba, opened on January 11, 2002, as part of the Bush administration's global "war on terror," in response to the terrorist attacks of September 11, 2001, it was not immediately apparent that it was a dangerous aberration from recognized laws and treaties that would tarnish America's name for years to come.

There had been hints that such would be the case: A 'war' had been declared when a crime had taken place. And a military order had been issued by the president in November 2001, entitled "Detention, Treatment, and Trial of Certain Non-Citizens in the War Against Terrorism." That order stated that members of al-Qaeda or those who harbored them could be held by the U.S. military and, if required, subjected to military trials.

Also worrying, when Guantánamo opened, were the photos of the first prisoners to arrive at the prison, shackled in orange jumpsuits and subjected to sensory deprivation, with their eyes and ears closed with blackout goggles and headphones. The photos shocked many of America's supporters, if not Americans themselves, who were used to orange jumpsuits from their domestic prisons. Moreover they had been primed relentlessly since the 9/11 attacks to enthuse over Wild West-style vengeance and not to ask too many questions.

Discarding the Geneva Conventions

Finally, for those paying particularly close attention, it was noticeable that there had been no official word about the use of "competent tribunals" under Article 5 of the Geneva Conventions to make sure that those being sent to Guantánamo as "the worst of the worst" were not, in fact, people seized by mistake.

Held close to the time and place of capture, competent tribunals were designed after the Second World War to separate combatants from civilians and are intended specifically for circumstances in which those detained are not part of a recognizable military organization. That was the case with al-Qaeda, although it was not, arguably, the same when it came to the Taliban, who were the government of Afghanistan and often wore recognizable headgear — their black turbans.

The importance of competent tribunals lies in their ability to allow prisoners of disputed provenance to defend themselves by calling witnesses, and they had been a key component in America's wars from Vietnam onwards. During the first Gulf War, for example, around 1,200 had been convened. In nearly three-fourths of those cases, it had been discovered that civilians had been seized in the fog of war and they were duly released.

The decision not to hold competent tribunals in Afghanistan, which was made at the highest levels of the Bush administration, shocked many in the military, who had been preparing to hold them until the order came that they were not to be used. For those watching closely, the decision was disastrous, leading to the filling of Guantánamo with largely insignificant Taliban foot soldiers or completely innocent men. That was revealed in December 2002 when, in the *Los Angeles Times,* Greg Miller reported that Maj. Gen. Michael Dunlavey, the commander of Guantánamo until October 2002, had complained about the number of "Mickey Mouse detainees" who had been sent to Guantánamo from Afghanistan.

Later revelations confirmed how chaotic the Bush administration's detention policies were, adding to the volume of "Mickey Mouse detainees." In July 2004, for example, "Chris Mackey," the pseudonym of a senior interrogator in the prisons at Kandahar and Bagram that were used to process prisoners for Guantánamo, revealed, in his book *The Interrogators* (written with Greg Miller), that orders had come from Camp Doha in Kuwait, where the military's top brass were stationed, that stipulated that every Arab who came into U.S. custody — with no exceptions allowed — had to be sent to Guantánamo.

Mackey's book also made it clear that Special Forces had further confused matters by dropping off prisoners without any explanatory information whatsoever. Although those operations accounted for some of the prisoners, an even bigger shock came in February 2006. Researchers at the Seton Hall Law School in New Jersey completed a statistical analysis of the Pentagon's own allegations relating to 517 of the 779 prisoners held at Guantánamo revealing that the majority of the prisoners had not even been seized by the U.S. military, but instead by their Afghan or Pakistani allies.

The Seton Hall analysis ascertained that 86 percent of the 517 prisoners were captured by the Northern Alliance or Pakistani forces, that 55 percent were not determined to have committed

any hostile acts against the United States or its allies, and that only 8 percent were alleged to have had any kind of affiliation with al-Qaeda.

Those figures thoroughly undermined the Bush administration's claims that the prisoners were "captured on the battlefield" and were, as Defense Secretary Donald Rumsfeld claimed, "among the most dangerous, best-trained, vicious killers on the face of the earth." The Bush administration's case was undermined further when it became apparent that bounty payments to America's allies in Afghanistan and Pakistan, averaging $5,000 a head, had been widespread and had contributed to the chaos.

While it took time for these truths about the chaotic basis of the "war on terror" to emerge, other damning information emerged in real time — specifically, the executive order issued by George W. Bush on February 7, 2002. In that order the president declared that Guantánamo was largely beyond the reach of the Geneva Conventions; the Geneva Conventions would apply to the Taliban prisoners, but not to those from al-Qaeda. He added that "to the extent appropriate and consistent with military necessity," all the prisoners would be treated "in a manner consistent with the principles" of the Geneva Conventions.

Bush's position had been signaled a month earlier on the day Guantánamo opened, when Rumsfeld stated unequivocally that the prisoners

will be handled not as prisoners of war, because they're not, but as unlawful combatants. Technically, unlawful combatants do not have any rights under the Geneva Convention. We have indicated that we do planto, for the most part, treat them in a manner that is reasonably consistent with the Geneva Conventions, to the extent they are appropriate.

Both Rumsfeld and Bush were wrong, in the important sense that everyone seized in wartime has rights. Common Article 3 of the Geneva Conventions, which applies to every prisoner, prohibits "outrages upon personal dignity" and "inhuman treatment." It was not until 2004, when an internal memo surfaced that had preceded Bush's executive order about the Geneva Conventions, that it was known how far the administration had gone in its cynical attempts to justify depriving Guantánamo prisoners of basic rights.

America's use of torture

That memo to the president, dated January 25, 2002, was signed by Alberto Gonzales, the president's chief counsel, but was actually written by David Addington, the legal counsel to Vice President Dick Cheney. In it, the legal contortions underlying the unprecedented classification of al-Qaeda prisoners as unlawful combatants were spelled out. Following up on administration claims that the "war on terror" was a new kind of war, the memo claimed, "In my judgment, this new paradigm renders obsolete Geneva's strict limitations on questioning of enemy prisoners and renders quaint some of its provisions."

What that meant, as later became apparent, was that one particularly "quaint" provision to be discarded was Common Article 3, the bulwark against torture. Again, it took time for the information to come out. After the Abu Ghraib scandal in Iraq broke in April 2004 (which ought to have demonstrated that torture and abuse had thoroughly infected the U.S. military and America's intelligence services), a secret memo, generally known as the "torture memo," was leaked. It demonstrated that lawyers in the Bush administration's Justice Department (in the Office of Legal Counsel, which is supposed to provide the executive branch with impartial legal advice), working closely with Dick Cheney, had cynically attempted to redefine torture so that it could be used by the CIA.

The torture program approved by Justice Department attorneys John Yoo and Jay S. Bybee in the Office of Legal Counsel involved the administration's reverse-engineering of torture techniques taught in U.S. military schools to help U.S. personnel to resist torture if they fell into enemy hands (the SERE program — Survival, Evasion, Resistance, Escape). A version of the program was then introduced at Guantánamo by Rumsfeld.

As the Senate Armed Services Committee noted in its detailed and remarkably thorough "Inquiry into the Treatment of Detainees in U.S. Custody" in 2008, the program involved techniques that included "stripping detainees of their clothing, placing them in stress positions, putting hoods over their heads, disrupting their sleep, treating them like animals, subjecting them to loud music and flashing lights, and exposing them to extreme temperatures." In the CIA's program, the techniques used also included waterboarding, a notorious torture technique that involves controlled drowning.

However, while that program was a key element in the administration's policy of running intelligence-gathering centers (of which Guantánamo was just one) in which coercion was a key component, those dark days were largely brought to an end in September 2006. After the Supreme Court ruled in *Hamdan v. Rumsfeld* that Common Article 3 applied to all prisoners in U.S. custody, it was reported that the Bush administration closed its secret torture prisons, moved 14 "high-value detainees" to Guantánamo, and recognized that its experiments in torture, abuse, and coercive interrogations would have to be brought to an end.

The legacy of those dark days lives on in the U.S. prison at Bagram airbase, in Afghanistan (and, more pointedly, at forward operating bases throughout Afghanistan). The military and the intelligence services on those bases seem to be happy that the Geneva Conventions have not been thoroughly reinstated; and interrogation there remains arguably more important than keeping people off the battlefield or determining whether they were even on a battlefield in the first place — with all the temptation to abuse prisoners that that approach entails.

In Guantánamo, however, it is fair to say that the days of coercive interrogations and of torture and abuse directed from the highest levels of government are over. Nevertheless, abuse remains, especially for those punished by armored teams of thugs when they infringe the rules, and for those who have resorted to hunger strikes to protest their confinement and who are brutally force-fed for doing so.

Detention as torture

Crucially, however, Guantánamo remains a form of torture in and of itself, for reasons that have to do with the prisoners' status as "enemy combatants" and the legislation used to justify their detention — the Authorization for Use of Military Force (AUMF).

Passed by Congress the week after the 9/11 attacks, the AUMF authorizes the president

to use all necessary and appropriate force against those nations, organizations, or persons he determines planned, authorized, committed, or aided the terrorist attacks that occurred on September 11, 2001, or harbored such organizations or persons, in order to prevent any future acts of international terrorism against the United States by such nations, organizations or persons.

In 2004, in *Hamdi v. Rumsfeld,* the Supreme Court confirmed that the AUMF also authorizes the detention of those held as a result of the president's activities. As law professor Curtis Bradley has noted, however, "Justice [Sandra Day] O'Connor's plurality opinion in *Hamdi* made clear that the Court was deciding only the authority to detain in connection with traditional combat operations in the Afghanistan theater." He also noted, "As for the proper length of detention, O'Connor largely avoided the question, although she did refer to the traditional ability under the international laws of war to detain individuals until the 'cessation of active hostilities.'"

Despite those reservations, *Hamdi* confirmed that the AUMF had established a world parallel to the one ruled by the Geneva Conventions, and the lingering and permanent injustice of Guantánamo stems from that decision. The problem is that, when the Bush administration decided to hold both al-Qaeda and Taliban prisoners as "enemy combatants," its failure to distinguish between the two (one a terrorist group, the other a government with a military) had dreadful unforeseen implications that have never been adequately addressed.

For the terror suspects in Guantánamo, the criminal trials that should have taken place have, with one exception, been brushed aside as a legitimate option because they have been portrayed as "warriors." For the soldiers, however, the problem is that they are not prisoners of war as defined by the Geneva Conventions, and so face an uphill struggle to argue that the "war" in which they were seized was, or is, finite, and is not the nebulous "war on terror" of the Bush administration.

Obama dropped the use of the terms "enemy combatant" and "war on terror," but left the structure and rationale for Guantánamo fundamentally unchanged. As a result, the men held there are still essentially held without rights. Neither criminal suspects nor soldiers, they have discovered that, although the Supreme Court recognized in June 2008 that they have constitutionally guaranteed habeas corpus protections, which led to the release of a handful of prisoners between December 2008 and January 2011, they have hit a brick wall in the deeply conservative court of appeals in Washington, D.C.

That court, which deals with challenges to the rulings made in the lower court, has realized that the basis for holding the prisoners — their involvement with al-Qaeda or the Taliban — is so vague that they have been able to completely shut down habeas as a way for any of the men still

being held to ever be freed from Guantánamo. Obama's own Guantánamo Review Task Force (consisting of more than 60 career officials and lawyers in various government departments and intelligence agencies) advised him not to release 48 of the men still held, even though there was no evidence in their cases that could be used in a court. The president agreed and, relying on the AUMF, he issued an executive order in March 2011 declaring that they would be held indefinitely, although with periodic reviews to establish their status.

Ten years after Guantánamo opened, it is time for this dangerous and damaging nonsense to be brought to an end. The AUMF should be repealed and criminal suspects (those thought to have been involved in terrorist activities) should be tried in federal court. Soldiers should be allowed to begin the litigation involved in demolishing the notion that a "war on terror" or a "long war" is legitimate and to seek their release, with the guarantee that, in future conflicts, the United States will once more adhere to the Geneva Conventions.

As it stands, Guantánamo is not just an aberration and a difficult legacy problem, but, as I mentioned above, a form of torture in and of itself. Because the AUMF does not concern itself with any endpoint to the detention of prisoners, and because no one has been able to open up a legal avenue to argue that that is unjust, prisoners can be held forever without any functioning challenge, given that the D.C. Circuit Court has gutted habeas of all meaning.

In criminal courts, such a delay is anathema, and for soldiers, the problem remains a war without end. Both are an abomination, but the most brutal aspect of this story is not just what it says about the chronic failures of U.S. justice at every level — the executive branch, lawmakers, and the judiciary — but what it means, uniquely for the prisoners. As Christophe Girod of the International Committee of the Red Cross told the *New York Times* in October 2003, breaking with protocol by speaking out publicly, "The open-endedness of the situation and its impact on the mental health of the population has become a major problem."

That open-endedness remains a problem that the Guantánamo prisoners do not share with those in the domestic prison system who were sentenced in a courtroom, or those imprisoned in connection with a specific military conflict. Its impact on the prisoners' mental health — never knowing when, if ever, they will be released — can only have become a far, far graver problem than it was eight years ago.